IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE CRIMINAL JURISDICTION

CRIMINAL APPEAL NO.1024 OF 2002

Karan @ Baasha Shyam Pawar,
At present in Ratnagiri Central Prison,
Resident of Vadi Bunder, P. D'mello road,
Chambhar Godinaka, Dongari, Mumbai.
...Appellant.

Vs.

The State of Maharashtra.

...Respondent.

Mr.Sachin Thorat i/by Mr. V.M.Thorat for the Appellant-Accused.

Smt.V.R. Bhosale, A.P.P. for the State.

CORAM: S.B. MHASE &
R.S. MOHITE, JJ.
DATE : March 15, 2007

ORAL JUDGMENT (Per R.S. Mohite, J.)

1. This is an appeal filed by the appellant/original accused No.4 Karan @ Basha Shyam Pawar impugning the judgment and order passed by the 1st Adhoc Additional Sessions Judge, Raigad-Alibag on 16.8.2002 in Sessions Case No.35 of 2001. By the impugned judgment and order, the trial court has convicted the appellant for offences punishable under Sections-396 and 397 of the Indian Penal Code. On these two counts, he has been sentenced to suffer life imprisonment and to pay a fine of Rs.5000/- in default

to suffer R.I. for two years. The original accused Nos. 1,2,3 and 5 to 9 who were tried alongwith the appellant were acquitted.

2. The facts of the prosecution case were as under.

a) P.W.No.1-Irshad Ismail Mulla was residing at Village Tempale, Taluka Mangaon, District Raigad alongwith his parents, brother and wife. On 20.9.2000, at about 11.30p.m. P.W.No.1 Irshad was sleeping in the hall of his house. His mother Khairunnisa was also sleeping in the hall alongwith P.W.No.1 Irshad. His father Irshad was sleeping separately in the bedroom.

b) At about 2.30 a.m. on 20.9.2000 P.W.No.1 Irshad heard some noises in the house. He saw 8 to 10 persons had entered into the hall. Out of these, three persons remained in the hall and the others spread into different rooms. As per the identification made in the court by P.W.No.1 Irshad they included the present appellant and accused No.1 Karan, The third person could not be identified by

him. These three persons in the hall started assaulting P.W.No.1 Irshad by bambu sticks. His mother Khairunnisa was also assaulted by these persons. The appellant Karan assaulted Irshad with a stick on his head. Accused Nos. 1 and 4 tied his hands and legs with a bed sheet. The accused also asked him about the keys of the locker but P.W.No.1 told him that he did not know about the keys. His mother became unconscious due to the beatings received by her. Somebody talk him to the bed room where his father was sleeping and asked about the keys. On reaching there he saw that one cupboard was lying on the ground, another cupboard had been broken open and the articles had been collected in a bedsheet.

c) At this point of time, P.W.No.1 Irshad became unconscious. After some time he got up. He extricated himself and went to the terrace and shouted for help to Dawood Kauchali who had his house nearby. He then rang up Majidbhai who was the Sarpanch. Ultimately he went to the police station and lodged an F.I.R. (Exh.32). Prior to his lodging complaint, he had ascertained that certain articles were missing and the articles which he had found to be missing, particularly, jewellery and cash of Rs.66,000/- was also mentioned as stolen in the F.I.R.

d) P.W.No.12 API. Diwakar Bhaskar Shelke was attached to the Goregaon Police Station. He recorded the complaint of P.W.No.1 Irshad and registered the offence under C.R.No.29 of 2000. After registering the offence, he commenced the investigation. He went to the spot and found that Ismail i.e. the father of P.W.No.1 Irish had expired. He prepared an inquest panchanama after calling two panchas (Exh.21). He sent the dead body of Ismail for post mortem. He found that Khairunissa was still alive and sent her for medical treatment to the hospital. He drew a spot panchanama (Exh.23). He called the photographer and got the photographs drawn. He called the dog squad. He drew the panchanama of the clothes on the person of P.W.No.1 Irshad (Exh.24).

e) About two months after this incident accused Nos.1 to 4 were arrested in connection with some other offence at Chiplun. They were shown as arrested in the present offence on 22.11.2000. After their arrest the present appellant Karan is said to have made a voluntary statement to the Investigating Officer on 29.11.2000 stating that he will point out the shop where he had sold the ornaments. In pursuance of his

statement, the police were led by the appellant to the shop of a Jeweller at Dongri at Mumbai but nothing was found. The Investigation Officer then arrested the Jeweller Lakhmichand who was arrained as accused No.6. After his arrest Lakhmichand made a disclosure to the police that the ornaments received by him were melted and he would produce the gold chip. The memorandum of accused No.6 Lakhmichand was drawn at Exh.40 and in pursuance of the said memorandum, a gold chip was seized from his shop (Exh.41). From 1.10.2000, the investigation was taken over by Dy. Superintendent of Police Dr.Mahavarkar. He recorded the statements of several persons. The accused No.4 Karan made a further statement to him on 1.12.2000, disclosing that he would produce a stick said to have to used in the offence. Accordingly, the memorandum statement of accused No.4 was drawn (Exh.50). The accused then took the police to the railway bridge and is said to have produced the stick from the bushes which was smeared with blood. The said stick Exh.14 was seized under panchanama Exh.41. In the mean while, Khairunissa had expired in the hospital on 14.10.2000. Her post mortem has been conducted on 15.10.2000 and the probable cause of death was shown as head injury. It is the prosecution case that in the course of the investigation, an identification parade was conducted through the Tahsildar, Mangaon. The said

identification parade was conducted on 25.11.2000. The prosecution witness No.1 Irshad was called to identify the accused nos. 3, 4, 2 and 1 in that order. P.W.No.1 Irshad was said to have identified only the accused Nos. 3 and 4. The muddemal articles which were seized were then sent to the Chemical Analyser. In due course, after completion of the investigation, charge-sheet came to be filed. The Chemical Analyser report which was received by the Investigating Officer was also filed in the court.

f) In due course the matter was committed to the Court of Sessions, the charges were framed by the Sessions Court and the trial commenced.

3. In order to prove its case the prosecution examined in all 13 witnesses. These included eye witness P.W.No.1 Irshad, P.W.No.8 Ramesh Patkar who had conducted the identification parade, the Investigating Officer P.W.No.12 A.P.I. Diwakar Bhaskar Shelke and P.W.No.13 Dy. S.P. Mahavarkar. During his evidence P.W.No.1 Irshad Mulla identified the accused Nos. 4 and 1 in the court. He however, failed to identify the other accused including the accused No.3 whom he had earlier identified in the

test identification parade. Taking into account, the evidence which was adduced by the prosecution in the trial court, particularly, the fact that there was inconsistency in the identification parade held on 29.11.2000 as well as in his substantial evidence of P.W.No.1 Irshad Mulla in the court, the trial court acquitted all the accused except the appellant and convicted and sentenced the appellant as aforesaid. Thus, being aggrieved, the appellant has filed the present appeal.

4. We have heard the both sides and perused the entire record. In our view the appeal deserves to be allowed for the reasons recorded as under.

5. A perusal of the evidence of Irshad Mulla who is the sole eye witness indicates that the entire incident has taken place in the dead of the night at about 2.30a.m. The case of the prosecution rests on the sole eye witness being able to identify the assailants. In so far as the identification parade is concerned, the said witness P.W.No.1 Irshad Mulla identified the accused No.3 in the identification parade but could not identify the same accused in the court. Similarly, he could not identify the accused

No.1 in the test identification parade but claimed to have identified him in the first time in the court. Relying upon such infirmities by P.W.No.1 Irshad both the accused Nos. 1 and 3 were given benefit of doubt and were acquitted. The question thus, remains as to whether his identification by accused No.4 is believable. The Trial Court has given reasoning that during the incident the appellant/accused No.4 had spent more time in interacting with this witness and therefore, P.W. No.1 Irshad had a better opportunity of seeing the accused and thus, identifying the accused No.4. The identification of accused No.4 in the court has been corroborated by his identification at the test identification parade. However on perusing the evidence of P.W.No.8 Ramesh Patkar who is the Tahsildar who conducted the identification parade. It appears that there is a fatal mistake in the holding of the parade. It appears that at first six dummies were put up alongwith the accused No.3 and accused No.3 is said to have been identified by P.W.No.1 Irshad. In his substantive evidence, P.W.No.8 Ramesh Patkar then stated that six new dummies were put up alongwith accused No.4 and accused No.4 was identified by P.W.No.1 Irshad. However, in the cross examination he had to admit that for all the four identification parades held on that day, the same six dummies were used. Now, it was argued by the

Advocate for the appellant that this was in breach of Criminal Manual. If the dummies were repeated and only one person was changed from the line up, then by deduction and common sense, the only new person in the second line up of the parade would be the accused. Thus, he contended that an identification of the accused by keeping same dummies at the second line up was a fatal error. He contended that the procedure followed is in violation of the procedure while conducting the identification parade as contained in the Criminal Manual. He relied upon a judgment of this Court in the case of **Mahesh Rohidas Kinalkar and ors. Vs. State of Goa reported in 2005 (2) B.C.R. (Cri.) Page 670** wherein this court held that the identification had been made in violation of the procedure as prescribed in the Criminal Manual. However, on reading the said judgment we find that the violation of the criminal manual was of different nature. We are also aware of the fact that the Apex Court has held that the evidence led in respect of the test identification parade was not in the nature of substantive evidence but the holding of test parade is a safe rule of prudence and can be used for corroboration purpose and that, if pot-holes were to be ferreted out from the evidence of the Magistrate holding such parades, possibly no test identification parade can escape from one or two lapses. What is

however, important in such cases is not number of lapses but the nature of lapses committed. If the nature of the lapse is of such a nature that it becomes possible for the witness to deduce as to who can be the accused persons then the lapse must be said to be of a fatal nature. In the present case, in the first test identification parade six dummies were used and accused No.3 was identified. In the second identification parade, sole eye witness P.W.No.1 Irshad was asked to identify the accused No.4 from amongst the same six dummies who had been used in the earlier parade concerning accused No.3. It is a matter of common sense that the dummies ought to have been changed otherwise the witness would know the sole persons introduced in the second line up. There are also other lapses which were pointed out by the Advocate for the appellant. These were that it was not mentioned in the memorandum of the parade that the accused were asked to change their position in the line up and clothes. This fact was admitted by the witness P.W.No.8 Ramesh Patkar who had held the parade. It was also pointed out that the Peon of the Tahsildar who was present in the parade room was sent to get the accused for identification purpose. He contended that this is also in violation of the Criminal Manual. He contended that, in view of the fact that same dummies were utilized, it would not be

safe to rely upon the evidence pertaining to the test identification parade. The question however, remains as to whether the identification of the accused No.4 in the court during his substantial evidence can be relied upon to convict the present appellant. We have already seen that P.W.No.1 Irshad has not been able to identify the accused No.3 in the court though the accused No.3 according to him was present with accused No.4 in the hall where he was sleeping. His inability to identify the accused No.3 is notwithstanding the fact that he identified the accused No.3 in the test identification parade. Similarly, he identified accused No.1 in court though he had not identified him in the test identification parade. We have scrutinised the evidence to determine if there was sufficient light to identify the assailants and in this regard we find that though the incident took place at 2.30a.m. there is no mention in the evidence of P.W.No.1 Irshad that any electric light was switched on or was burning at the time of incident. He admits in his cross examination that some of the persons had muffled their faces. He further admits that light in the house was dim. It appears that the light was coming from the street light. The street light is not shown in the spot panchanama or in the map drawn. The spot panchanama also does not refer to any light. It is unfortunate that the police have not

taken any care to show the existence of sufficient light for identifying the assailants.

6. As far as other evidence is concerned, there is alleged discovery of a stick at the behest of accused No.4. This memorandum is made several days after the arrest of accused No.4 on 22.11.2000. This is the second memorandum and earlier accused No.4 is said to have disclosed about the shop where he allegedly sold the ornaments. However, nothing was recovered at the first instance and it is only after the jeweller was made an accused that a gold chip is recovered. The said gold chip is however, said to be made by melting the ornaments and therefore, there is no recovery or identification of any ornaments. The evidence pertaining to the recovery of the stick on 7.12.2000 is also not much of significance as the blood group found on the stick has been found to be inconclusive. It was pointed out that the panchanama did not indicate that the stick was sealed and that the blood stained clothes of the deceased were available at the police station. In any case, we find that this evidence relating to the recovery of stick at a belated stage is not very strong evidence particularly, as the blood on the stick has not been proved to be matching with the blood group of the

deceased and it has also not been proved by the prosecution as to whether or when the stick was sealed before it was sent to Chemical Analyser, particularly, as the parcels of the Chemical Analyser's office were received in sealed condition.

7. Taking an over all view of the matter, we find that the present appeal will have to be allowed and the accused will have have to be acquitted of all charges. Hence, we pass the following order.

a). Appeal is allowed.

b). The conviction and sentence of the appellant-Karan @ Basha Shyam Pawar is quashed and set aside and he is acquitted of all the charges against him. He shall be released forthwith, if not required in any other case.

c). Fine amount, if any, paid shall stand refunded.

d). The appeal stands disposed off accordingly.

(R.S. MOHITE, J.) **(S.B. MHASE, J.)**

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CORAM: S.B. MHASE &
R.S. MOHITE, JJ.
DATE : March 15, 2007

P.C.

. For the reasons separately recorded in the oral judgment, this court passed the following order.

1. Appeal is allowed.

2. The conviction and sentence of the appellant-Karan @ Basha Shyam Pawar is quashed and set aside and he is acquitted of all the charges against him. He shall be released forthwith, if not required in any other case.

3. Fine amount, if any, paid shall stand refunded.

4. Appeal shall stand disposed off accordingly.

(R.S. MOHITE, J.) **(S.B. MHASE, J.)**